



**Kenya Building Construction, Timber and Furniture Industries Employees Union v Vaghjiyani Enterprises Limited (Cause E121 of 2023) [2024] KEELRC 2019 (KLR) (25 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2019 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE E121 OF 2023**

**JK GAKERI, J**

**JULY 25, 2024**

**BETWEEN**

**KENYA BUILDING CONSTRUCTION, TIMBER AND FURNITURE  
INDUSTRIES EMPLOYEES UNION ..... CLAIMANT**

**AND**

**VAGHJIYANI ENTERPRISES LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant union commenced this suit by a Memorandum of Claim filed on 15<sup>th</sup> February, 2023 alleging refusal by the Respondent to pay redundancy dues.
2. The Claimant avers that the grievant was employed by the Respondent on 28<sup>th</sup> August, 2012 as a Welder at Kshs.1,000/= per day paid weekly in cash until 2018 when the Respondent started paying by Mpesa.
3. It is the Claimant's case that he served diligently.
4. The Claimant avers that he was declared redundant on 28<sup>th</sup> August, 2021 and the Respondent refused to pay terminal dues and attempts by the Claimant union to settle the dispute by mediation fell through although the Respondent had proposed to pay the grievant Kshs.93,400/= comprising one month's salary in lieu of notice, one month's leave and 2 years severance pay, which the Claimant declined.
5. The Claimant prays for;
  - a. A declaration that the dismissal of the grievant was unfair and unlawful.
  - b. Kshs.388,000.00 comprising;
    - i. 2 months' notice Kshs.52,000/=



- ii. Leave for 8 years Kshs.208,000/=
- iii. Severance pay for 8 years Kshs.128,000/=
- c. Compensation for unlawful termination.
- d. Costs of the suit.

### **Respondent's case**

- 6. By its Memorandum of Response dated 15<sup>th</sup> November, 2023, the Respondent avers that the grievant was not its employee.
- 7. It is the Respondent's case that the Claimant was engaged from time to time whenever there was a welding work as an independent contractor and was notified when there was no work.
- 8. That Mpesa statements reveal that the grievant did not work continuously in any given month as welding was not required at all times.
- 9. The Respondent denies having declared the grievant redundant or terminating his employment.
- 10. It avers that the Claimant rejected the Respondent's offer.
- 11. The Respondent prays for dismissal of the Claimant's suit with costs.

### **Claimant's evidence**

- 12. On cross-examination, the grievant confirmed that he had no letter of appointment and wages were paid weekly. That he joined the union in August 2020 and paid dues though the record reveals no dues were paid.
- 13. The witness testified that he worked for 6 days per week at Kshs.6,000.00 but on 19<sup>th</sup> October, 2019 he was paid Kshs.14,000.00 and the amount paid varied as follows; 12<sup>th</sup> October, 2019 Kshs.6,000.00, 5<sup>th</sup> October, 2019 Kshs.6,750.00, 22<sup>nd</sup> February, 2018 Kshs.25,125.00, 2<sup>nd</sup> February, 2019 Kshs.35,000.00.
- 14. On re-examination, the Claimant testified that he was employed for the Kitenga Project at the EPZ to make doors, windows and grills.
- 15. That the union card on record had his name.

### **Respondent's evidence**

- 16. RWI confirmed that he attended three (3) conciliation meetings and the grievant was represented by one Mr. Maina who was the Respondent's employee.
- 17. The witness testified that the grievant was engaged on a need basis and was semi-skilled.
- 18. That the Respondent made a Counter-offer during mediation which was part of the Claimant's documents.
- 19. The witness admitted that he did not file any employment records of the Claimant or a payment schedule.
- 20. On re-examination, the witness confirmed that the Respondent was not obligated to examine the grievant's qualifications as he was an Independent Contractor.



### **Claimant's submissions**

21. As to whether the grievant was an employee of the Respondent, the Claimant submits that the Respondent's argument that the Claimant was an Independent Contractor was an afterthought, as it was not raised in the pleadings and had made a counter offer.
22. The Claimant urges that the grievant was an employee of the Respondent.
23. Reliance was made on the decisions in Benjamin Joseph Omusamia V Upperhill Springs Restaurant (2021) eKLR, Ready Mixed Concrete (South East) Ltd V Minister of Pensions and National Insurance on the tests applied in determining whether a person is an employee or an Independent Contractor, to urge that in the instant case, the grievant was an employee as the Respondent notified him on when to work and paid weekly wages and no evidence of engagement of an Independent Contractor was adduced.
24. On redundancy, the Claimant submits that the call by Mr. Banuary on 28<sup>th</sup> August, 2021 on the shortage of work was a redundancy statement and employment was lost at the instance of the Respondent.
25. The Claimant urges that the provisions of Section 40(1) of the [Employment Act](#), 2007 were not complied with.
26. According to the Claimant union, the Regulation of Wages and Conditions of Employment (Building and Construction Industry) Order, 2013 and 2004 are applicable in cases of a redundancy.

### **Respondent's submissions**

27. As to whether the Claimant union has locus to bring the claim, counsel submits that it does not as the membership card does not state when the grievant joined the union and appear to have joined in 2022 as the backside of the card has columns on contributions from 2022 and was thus not a member of the union in 2020.
28. Counsel urges the court to dismiss the claim for want of locus standi by the union.
29. On employer/employee relationship, counsel submits that there was none as the Human Resource Manager testified that the Claimant was an independent contractor and his salary varied from time to time.
30. On constructive dismissal, counsel submits that the Claimant adduced no evidence of redundancy and was not at work all the time and there was no redundancy.
31. Reliance was made on Section 47(5) of the [Employment Act](#), on the burden of proof to urge that the Claimant had failed to prove that he was an employee of the Respondent.
32. As regards the reliefs sought, counsel urges that the Claimant is not entitled to any for want of proof.

### **Analysis and determination**

33. The issues for determination are;
  - i. Whether the grievant was an employee of the Respondent.  
Depending on the answer to (i) above;
  - ii. Whether termination of the grievant's employment was unfair and unlawful.



34. On the 1<sup>st</sup> issue, Section 2(1) of the *Employment Act*, 2007 defines an employee as;  
A person employed for wages or a salary and includes an apprentice and indentured learner.
35. In addition, the Act defines a contract of service as;  
An agreement whether oral or in writing and whether expressed or implied, to employ or to serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership but does not include for a foreign contract of service to which Part XI of this Act applies.”
36. In this case, the grievant asserts that he was employed by the Respondent on 28<sup>th</sup> August, 2012 as a Welder. However, his only connection with the Respondent are the payments he received through Mpesa from August 2018 to sometime in 2019 and the amount received varied from time to time.
37. For instance, on 31<sup>st</sup> August, 2018, he was paid Kshs.7,500.00 in October 2018 he received Kshs.6,000.00, on 16<sup>th</sup> December, he was paid Kshs.9,000/= and Kshs.26,125.00 on 22<sup>nd</sup> December, 2018, 7<sup>th</sup> December, 2018 Kshs.6,375.00.
1. January 2019
    - 9<sup>th</sup> January, 2019 Kshs.5,000.00
    - 16<sup>th</sup> January, 2019 Kshs.8,000.00
    - 25<sup>th</sup> January, 2019 Kshs.6,000.00
    - 30<sup>th</sup> January, 2019 Kshs.2,000.00
    - Total Kshs. 21,000.00
  2. February 2019
    - 7<sup>th</sup> February, 2019 Kshs.10,125.00
    - 14<sup>th</sup> February, 2019 Kshs.11,250.00
    - 22<sup>nd</sup> February, 2019 Kshs.5,000.00
    - 28<sup>th</sup> February, 2019 Kshs.8,125.00
    - Total Kshs.34,500.00
  3. March
    - 4<sup>th</sup> March, 2019 Kshs.40,000.00
    - 9<sup>th</sup> March, 2019 Kshs.9,375.00
    - 16<sup>th</sup> March, 2019 Kshs.9,375.00
    - 22<sup>nd</sup> March, 2019 Kshs.5,375.00
    - Total Kshs.64,125.00
  4. April
    - 13<sup>th</sup> April, 2019 Kshs.9,000.00
    - 15<sup>th</sup> April, 2019 Kshs.5,000.00
    - 26<sup>th</sup> April, 2019 Kshs.6,125.00



Total Kshs.20,125.00

5. May

4<sup>th</sup> May, 2019 Kshs.7,000.00

10<sup>th</sup> May, 2019 Kshs.5,000.00

18<sup>th</sup> May, 2019 Kshs.7,250/=

25<sup>th</sup> May, 2019 Kshs.7,250

31<sup>st</sup> May, 2019 Kshs.7,250

Total Kshs.33,750/=

38. The foregoing leaves no doubt that the grievant and the Respondent had a relationship under which the Respondent remunerated the grievant weekly as he testified and submitted and the Respondent tendered no evidence to controvert the grievant's testimony that he was earning a daily rate of Kshs.1,000/= or how it engaged the grievant as an Independent Contractor.
39. Puzzlingly, RWI, Mr. Noel Owino testified that the grievant was engaged as a Welder to work as an Independent Contractor but tendered no scintilla of evidence of the particulars including timing and remuneration and appears to rely on the grievant's Mpesa statements to ameliorate its evident which lacks essential particulars as it comprises general statements with no supportive evidence.
40. Strangely, the Respondent adduced no documentary evidence to support its case, not even the Counter-offer it allegedly made which the union rejected.
41. Flowing from the foregoing, it is discernible that the Respondent has no evidence on when and how it engaged the grievant and on what terms let alone when the two separated.
42. The grievant's statement is explicit that on 28<sup>th</sup> August, 2021, he received a call from one Mr. Banuary, the Assistant Manager who informed him that his services were no longer required owing to shortage of work, evidence the Respondent did not controvert. It did not deny that it had an Assistant Manager by the name Banuary or that no such communication was made or that the parties separated otherwise.
43. Significantly, the Respondent adduced no evidence to demonstrate how it countered the grievant's allegation that he was declared redundant.
44. It did not even avail copies of its responses to any of the five letters on record or any other.
45. On cross-examination, the grievant confirmed that he worked day and night which accounted for the wage disparities per month.
46. From the Mpesa statements on record, it is decipherable that the grievant's wages were being paid per week, evidence the Respondent did not controvert.
47. Even assuming that the grievant worked on a casual basis, as the Respondent adduced no shred of evidence to show that the grievant was an Independent Contractor, the duration of employment exceeds the duration prescribed by Section 37 of the *Employment Act*, 2007 on transition from causal to term contract.
48. The totality of the evidence adduced by the Claimant is that the court is persuaded and finds that the Claimant has demonstrated that the grievant was an employee of the Respondent from 2012, paid in cash until 2018 when the Respondent commenced payment by Mpesa as evidenced by the grievant's Mpesa statements for 2018 and 2019.



49. On termination of employment, the Respondent neither adduced evidence of the separation nor controvert the grievant's testimony that he was called by Mr. Banuary and notified of the shortage of work on 28<sup>th</sup> August, 2021. In its Counter-offer, the Respondent admits that the grievant was its employee from August 2012 to August 2020, a duration of 8 years and 9 months and his final dues were computed at Kshs.94,200/=.
50. The fact that the Respondent made a counter offer would appear to confirm that the grievant was its employee.
51. Bearing in mind that the Respondent neither denied that Mr. Banuary was its Assistant Manager nor the fact that he made the alleged call on 28<sup>th</sup> August, 2021, the court is satisfied that the statement by Mr. Banuary was a redundancy statement and the provisions of Section 40 and 45 of the [Employment Act](#), 2007 had to be complied with.
52. As held by the Court of Appeal in *Barclays Bank of Kenya V Gladys Muthoni & 20 others* (2018) eKLR, the law places a heavy burden on employer to prove that it complied with the law on redundancy.
53. It requires no emphasis that redundancy is one of the legitimate and legally sanctioned approaches to separation in an employment context and the provisions of Section 40(1) of the [Employment Act](#), 2007 must be complied as underscored by the Court of Appeal in *Freight In Time V Rosebell Wambui Munene* (2018) eKLR as follows;
- “In addition, Section 40(1) of the [Employment Act](#) prohibits in mandatory tone the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions namely; . . .”
54. The conditions include notices to the union or the affected employee and the Labour Officer, selection criteria, equity where a Collective Bargaining Agreement provides for redundancy dues, payment of unpaid leave in cash, notice or pay in lieu of notice and severance pay.
55. The Respondent tendered no evidence of having complied with any of the provisions of Section 40(1) of the [Employment Act](#), 2007 and as a consequence the redundancy transitioned to an unfair termination of employment for which the grievant has a cause of action against the Respondent.
56. As to whether the Claimant union has locus standi to bring the instant action against the Respondent, RWI confirmed that the Respondent participated in the conciliation proceedings and even made an offer which the Claimant allegedly rejected.
57. The grievant testified that he joined the union in August 2020 and paid its dues as an employee.
58. The foregoing would appear to explain why the grievant approached the union to pursue the claim on his behalf against the Respondent.
59. Although the grievant's membership card on record has no date and the reverse side of the same has no entries of the amount paid, the court is persuaded that the union has the requisite locus standi to represent the grievant as its member.



## **Appropriate reliefs**

### **i. Declaration**

60. Having found that termination of the grievant's employment by the Respondent was unfair for non-compliance with the provisions of the [Employment Act, 2007](#), a declaration to that effect is merited.

### **ii. Two months' notice Kshs.52,000/=**

61. Neither the Claimant nor the Respondent provided a copy of the employment contract.
62. More significantly, the Claimant provided no factual or legal basis for the claim and it is declined.
63. The grievant is however awarded one (1) month's salary in lieu of notice Kshs.26,000/=.

### **iii. Leave for 8 years**

64. The Claimant adduced no evidence on when the leave days accrued, how many they were including why he did not proceed on leave.
65. In the absence of such evidence, the prayer lacks particulars and it is accordingly dismissed.

### **iv. Severance pay for 8 years**

66. Having found that the alleged redundancy transitioned to an unfair termination of employment, the prayer for severance pay is unsustainable and is declined.

### **v. Compensation for unlawful termination**

67. Having found that termination of the grievant's employment by the Respondent was unfair within the meaning of Section 45 of the [Employment Act, 2007](#), the grievant is entitled to compensation under Section 49(1)(c) of the [Employment Act](#).
68. In determining the quantum of compensation, the court has considered that, the grievant was not to blame for the termination. The grievant had served diligently and had no recorded misconduct. The grievant did not express his wish to remain in the employment of the Respondent or appeal the termination of employment.
69. In the circumstances, the court is satisfied that the equivalent of four (4) months' gross salary is fair, Kshs.104,000.00.
70. In the upshot, judgment is entered in favour of the Claimant against the Respondent as follows;
- a. Declaration that termination of employment was unfair.
  - b. One month's salary in lieu of notice, Kshs.26,000.00.
  - c. Equivalent of 4 months gross salary Kshs.104,000.00.

**Total Kshs.130,000.00**

71. In the circumstances of this case, it is only fair that parties bear their own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25<sup>TH</sup> DAY OF JULY 2024**

**DR. JACOB GAKERI**



## **JUDGE**

### Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

## **JUDGE**

